



STATE OF WISCONSIN

In the Matter of



DECISION

MGE/157067

The attached proposed decision of the hearing examiner dated October 31, 2014, is modified as follows and, as such, is hereby adopted as the final order of the Department.

PRELIMINARY RECITALS

Pursuant to a petition filed April 23, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by Waukesha County Health and Human Services in regard to Medical Assistance, a hearing was held on September 11, 2014, at Waukesha, Wisconsin.

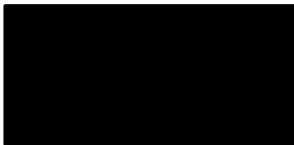
The issue for determination is whether Waukesha County Health and Human Services (the agency) correctly terminated the Petitioner's Medicaid benefits, effective May 1, 2014.

NOTE: The record was held open until October 22, 2014, to allow the parties to submit briefs.

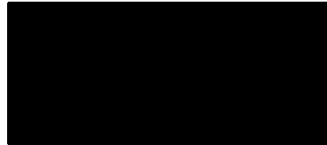
There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:



Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Attorney Deborah B. Price
Waukesha County Corporation Counsel Office
515 W. Moreland Blvd., Room AC-330
Waukesha, WI 53188

ADMINISTRATIVE LAW JUDGE:

Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

*As agreed to in the Stipulated Findings of Fact signed by [REDACTED] on July 18, 2014 and
by Attorney Price on July 29, 2014*

1. Petitioner (CARES # 2146426829) is a resident of Waukesha County.
2. The Petitioner has resided in a nursing home since 2002.
3. The Petitioner applied for Nursing Home Long Term Care Medicaid benefits in April 2012.
4. Petitioner's spouse refused to sign the 2012 application and/or refused to provide information regarding his assets.
5. In April 2012, *Medicaid Eligibility Handbook (MEH)* §2.5.3 directed agencies to test an institutionalized person's eligibility as if s/he were unmarried, if the community spouse's signature is missing on the spousal impoverishment application. Consequently, the agency processed the Petitioner's Medicaid application, as a single person's application.
6. The agency approved Medicaid benefits for the Petitioner from April 2012 through March 2013 and at renewal, the agency again approved benefits from March 2013 through February 2014.
7. On November 11, 2013, the Wisconsin Department of Health Services (DHS) amended MEH §2.5.3, eliminating the direction described in Finding of Fact #3 and adding language directing the county agency to deny applications if the community spouse refuses to sign the application or refuses to provide required information, unless the denial would result in undue hardship for the person.
8. In February 2014, the Petitioner needed to complete a renewal, but her husband refused to disclose his assets.
9. On March 20, 2014, Petitioner's Durable Power of Attorney assigned Petitioner's support rights to the State of Wisconsin.
10. On March 28, 2014, Petitioner's Attorney provided the agency with a list of assets held in Petitioner's husband's name.
11. On March 28, 2014, Petitioner's husband signed a document indicating that he was refusing to support the Petitioner.

Other Facts

12. On April 18, 2014, the agency sent the Petitioner a notice entitled Information about Community Spouse Asset Share Calculation, indicating that it had determined that the countable assets of the Petitioner and her husband totaled \$586,932.10 and that her asset limit for Medicaid eligibility was \$119,240.00. (Exhibit I)
13. Also, on April 18, 2014, the agency sent the Petitioner a notice indicating that her Nursing Home Long Term Care Medicaid benefits would be ending effective May 1, 2014, because she was over the asset limit. (Exhibit J)
14. The Petitioner's attorney filed, on her behalf, a request for fair hearing that was received by the Division of Hearings and Appeals on April 23, 2014. (Exhibit 1)
15. The assets held in the spouse's name, that Petitioner's attorney initially indicated were exempt, totaled \$861,413.60. Petitioner's attorney further indicated that there were other, additional assets that totaled \$603,266.95. (Exhibit G)

DISCUSSION

Jurisdiction

Attorney Price argues that the Petitioner does not have standing to administratively appeal the termination of her Medicaid benefits, because she is arguing that the Medicaid Eligibility Handbook provisions are not consistent with Federal regulations concerning spousal impoverishment rules.

Wis. Admin. Code §DHS 104.01(5)1. states that, “Applicant and recipient have the right to a fair hearing in accordance with procedures set out in this subsection when aggrieved by action or inaction of the agency or the department...”

Wis. Admin. Code §DHS 104.01(5)4. states, “No fair hearing is required when the sole issue being petitioned involves an automatic adjustment or change which affects an entire class of recipients and is the result of a change in state or federal law.”

Had the Petitioner filed an appeal because her application for Medicaid benefits was denied due to her spouse’s refusal to sign the application or provide verification of his assets, then Attorney Price would be correct. It is undisputed between the parties that Medicaid Eligibility Handbook section 2.5.3 was amended to be consistent with a change in state law. Specifically, the legislature amended Wis. Stats. § 49.455 (5), adding subsection (e), which states, “The Department may deny to the institutionalized spouse eligibility for Medical Assistance if, when requested by the department, the institutionalized spouse and the community spouse do not provide the total value of their assets and information on income and resources to the extent required under federal Medicaid law or sign the application for Medical Assistance.”

In this case, however, the denial of eligibility was based upon a determination that the Petitioner was over the asset limit. Pursuant to Wis. Admin. Code §DHS 104.01(5)1. above, the Petitioner has correctly filed for an administrative fair hearing. Additionally, under Wis. Stats. §49.455 (8), the Petitioner is entitled to a fair hearing concerning the attribution of resources:

(8) FAIR HEARING.

(a) An institutionalized spouse or a community spouse is entitled to a departmental fair hearing concerning any of the following:

1. The determination of the community spouse monthly income allowance under sub.(4)(b).
2. The determination of the amount of monthly income otherwise available to the community spouse used in the calculation under sub. (4) (b).
3. After an application for medical assistance benefits is filed, the computation of the spousal share of resources under sub. (5) (a) 1.
4. The attribution of resources under sub. (5) (b).
5. The determination of the community spouse resource allowance under sub. (6) (b).

Counsel also argues that Waukesha County is not properly a party to this action, because Petitioner disputes the Department of Health Services interpretation of the law. Wis. Admin. Code §DHS 104.01(5)1. states that a person may file an appeal when, “aggrieved by action or inaction of the agency or the department.” County agencies act as agents of the Department of Health Services in processing applications and making eligibility determinations; and on a regular basis, county agencies act as agents of the Department of Health Services at fair hearings. Indeed, in the case at hand, Waukesha County acted as agent of the Department of Health Services in conducting the Petitioner’s renewal and it was Waukesha County that made the decision to terminate the Petitioner’s benefits, based upon its determination of her assets. Accordingly, it is found that Waukesha County has correctly been made a party to this action, since it was acting as an agency of the Department of Health Services in processing the Petitioner’s renewal of her benefits.

the Petitioner's renewal of her benefits.

Attribution of Assets

MEH §2.5.3 states, "For ongoing cases where eligibility was determined without using spousal impoverishment rules, apply the spousal impoverishment rules at the next renewal. This includes completing an asset assessment using the couples' assets on the first day of the month of the review month and determining eligibility for the next certification period...." This Handbook provision operationalized the language in § 49.455(5)(e) that requires spouses to provide asset and other information "when requested by the department." Eligibility redeterminations occur annually, if not sooner, and financial information is requested in that process.

It is undisputed that the agency followed the directions of the above MEH provision and terminated the Petitioner's benefits. In her brief, Petitioner's attorney agrees that Spousal Impoverishment rules govern this case. (See page one of Petitioner's brief) However, Petitioner's attorney argues that under 42 U.S.C. 1396r-5(c)(3) and (4), that the agency incorrectly used Petitioner's assets as a basis for ending her Medicaid benefits.

Under 42 U.S.C. §1396r-5(c)(1) and (2) at the time of initial application, all resources of the institutionalized spouse and community spouse are to be considered, assessed and documented by the State agency.

Under 42 U.S.C. §1396r-5(c)(3) "The institutional spouse shall not be ineligible by reason of resources determined under paragraph (2) to be available for the cost of care where –

- (A) The institutionalized spouse has assigned to the State any rights to support from the community spouse;
- (B) The institutionalized spouse lacks the ability to execute an assignment due to physical or mental impairment but the State has the right to bring a support proceeding against a community spouse without such assignment; or
- (C) The State determines that denial of eligibility would work an undue hardship."

Under 42 U.S.C. §1396r-5(c)(4), Separate treatment of resources after eligibility for benefits established, it states, "During the continuous period in which an institutionalized spouse is in an institution and after the month in which an institutionalized spouse is determined to be eligible for benefits under this subchapter, no resources of the community spouse shall be deemed available to the institutionalized spouse."

In the case at hand, Petitioner's power of attorney assigned to the State of Wisconsin, any rights to support from the community spouse. This may appear to determine the outcome of this matter given that § 1396r-5(c)(3)(A) and its state counterpart at § 49.455(5)(c)1. state that assigning rights to support then shields the institutionalized spouse from being found resource ineligible. However, that provision has been rendered meaningless in Wisconsin because of *Chippewa County DHS v. Bush*, 305 Wis. 2d 181 (Ct App 2007). The court held that an agency is barred from pursuing spousal support from a community spouse for his or her institutionalized spouse who is receiving medical assistance. Because there is no longer a *right* to support, Petitioner's assignment is of no consequence. The federal Medicaid Manual supports my finding. At § 3261 the guidance notes that eligibility will not be denied for excess resources if all support rights are assigned and includes the following definitions (with emphasis supplied):

A Support Right.--Pending publication of regulations, a reasonable definition is: The *right* of institutionalized spouses *to receive support* from community spouses under State law.

Assigned Support Rights.--Pending publication of regulations a reasonable definition is: An assignment of a support right *allowing you to go against community spouses for reimbursement*

This right does not exist and therefore the protection under the above-referenced laws does not apply.

Petitioner's spouse eventually disclosed the couple's resources on March 28, 2014 at which point the agency found Petitioner to be ineligible for excess assets. Petitioner argues, however, that her spouse should not have been asked to supply his resource information because §1396r-5(c)(4) states that no resources of the community spouse may be deemed available to the institutionalized spouse once eligibility is established. She further claims that those resources cannot be counted in determining her continued eligibility. Petitioner misapplies the statute to this circumstance. Petitioner's 2012 eligibility was not determined using spousal impoverishment provisions. Her spouse made sure of that by refusing to provide information. Had the spousal impoverishment process occurred as intended, a community spouse resource allowance (CSRA) would have been calculated and the amount of that allowance would have been transferred to Petitioner's spouse and/or no longer deemed available to Petitioner. §1396r-5(c)(4) would then kick in and Petitioner's spouse would have the amount of resources the law intended him to have and he would not be required to use those resources for Petitioner's care. That process did not happen, again because Petitioner's spouse failed to cooperate and presumably because his resources exceeded the permitted CSRA. Understandably Petitioner and her spouse now wish to use a spousal impoverishment provision that will benefit them, but they cannot have it both ways. Petitioner's eligibility was not determined under spousal impoverishment rules and she, therefore, cannot avail herself of its post-eligibility provisions.

The final determination is what point-in-time snapshot should be used for determining resource eligibility. I agree with Petitioner that federal and state law at § 1396r-5(c)(1)(A) and § 49.455(5)(a), respectively, direct that a spousal share should be based on the total joint resources computed "as of the beginning of the first continuous period of institutionalization." Therefore, the agency should have determined the spousal share to be used in computing the community spouse resource allocation based on the couple's resources when Petitioner entered the nursing home in 2002. I will remand this case to the agency for a determination consistent with this conclusion and Petitioner and her spouse will be required to cooperate in supplying the resource information.

CONCLUSIONS OF LAW

1. Petitioner's assignment of spousal support does not prevent ineligibility by reason of resources.
2. The agency correctly considered the joint assets of Petitioner and her spouse in determining her continued eligibility at the time of renewal.
3. Petitioner's continued eligibility should be determined using a spousal share calculated from the resource level at the beginning of Petitioner's continuous period of institutionalization and not from the resource amounts for Petitioner and her spouse as of April, 2012.

THEREFORE, it is

ORDERED

This matter is remanded to the agency to determine if Petitioner is eligible for Institution Long-Term Medicaid Benefits using a spousal share for purposes of determining the community spouse resource allocation that is based upon the resources she and her spouse had available at the beginning of her institutionalization in 2002. Should Petitioner and her husband fail to provide the necessary information then the agency shall find Petitioner to be ineligible under Wis. Stat. § 49.455(5)(e).

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST". Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

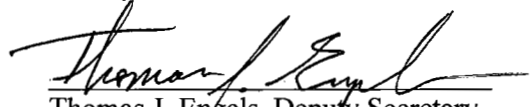
The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI, 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of
Madison, Wisconsin, this 30 day
of April, 2015.


Thomas J. Engels, Deputy Secretary
Department of Health Services